SUPREME COURT, U. S.

Office Supreme Court, U.S.
FILED
FEB 28 1969
JOHN F. DAVIS, CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM 1968

DOCKET No. 1004

MARGARET COX, HOWARD R. MOODY, ALEX J. ROSENBERG, HUMBERTO APONTE, PAUL KERRIGAN, ANDREW COOPER, STANLEY HARRY HAMILTON, PETER WEISS and BEATRICE JONES, individually and on behalf of all other citizen-electors of the City of New York,

Petitioners,

against

HERMAN KATZ, City Clerk of the City of New York and JAMES M. POWER, THOMAS MALLEE, MAURICE J. O'ROURKE and J. J. DUBERSTEIN, Commissioner of Election, constituting the Board of Elections in the City of New York and ATTORNEY GENERAL OF THE STATE OF NEW YORK,

Respondents.

BRIEF OF RESPONDENT ATTORNEY GENERAL IN OPPOSITION TO CERTIORARI

LOUIS J. LEFKOWITZ
Attorney General of the
State of New York
Respondent Pro Se
80 Centre Street
New York, New York, 10013

SAMUEL A. HIRSHOWITZ
First Assistant Attorney General

PHILIP WEINBERG
Principal Attorney

GEORGE D. ZUCKERMAN
Assistant Attorney General
Of Counsel

249 Press of Fremont Payne, Inc., 80 Washington St., N. Y.—BOwling Green 9-8153

INDEX

PAGE

Statement 1

Prior Proceedings 2

ARGUMENT—No substantial constitutional question worthy of consideration by this Court is raised by petitioners. The attempt to extend the *Reynolds* v. *Sims* holding to void last year's election of judges of the Civil Court of the City of New York is utterly without merit 5

Conclusion 13

TABLE OF CASES CITED

American Fed. of Labor v. Watson, 327 U. S. 582 (1946) 12

Baker v. Carr, 369 U. S. 186 (1962) 7

Bell v. Southwell, 376 F. 2d 659 (5th Cir. 1967) 10, 13

Buchanan v. Rhodes, 249 F. Supp. 860 (N. D. Ohio 1966) 8

Ellis v. Dixon, 349 U. S. 458 (1955), reh. den. 350 U. S. 855 6

Exon v. Tiemann, 279 F. Supp. 609 (D. C. Neb. 1968) 12

Hamer v. Campbell, 358 F. 2d 215 (5th Cir. 1966) 10

Head v. New Mexico Bd. of Examiners, 374 U. S. 424 (1963) 6

Jones v. Alfred H. Mayer & Co., 392 U. S. 409 (1968) 11

Jones v. Falcey, 48 N. J. 25, 222 A. 2d 101 (1966) 9

PAGE

Kail v. Rockefeller, 275 F. Supp. 937 (E.D.N.Y. 1967) 4, 8

Kilgarlin v. Martin, 252 F. Supp. 404 (S. D. Tex. 1966), rev'd on other gds. *sub nom.* Kilgarlin v. Hill, 386 U. S. 999 9

Mann v. Davis, 245 F. Supp. 241 (E. D. Va. 1965), aff'd *sub nom.* Burnette v. Davis, 382 U. S. 42 .. 9

N. Y. State Assn. of Trial Lawyers v. Rockefeller, 267 F. Supp. 148 (S.D.N.Y. 1967) 4, 8

Norman M. Morris Corp. v. Hess Bros., 243 F. 2d 274 (3rd Cir. 1957) 12

Reynolds v. Sims, 377 U. S. 533 (1964) 5, 8

Sincock v. Gately, 262 F. Supp. 739 (D. C. Del. 1967) 9

Smith v. Allwright, 321 U. S. 649 (1944) 12

Stokes v. Fortson, 234 F. Supp. 575 (N. D. Ga. 1964) 7, 8

Williams v. Rhodes, 393 U. S. 23 (1968) 13

Wright v. Rockefeller, 376 U. S. 52 (1964) 4, 9

CONSTITUTIONAL PROVISIONS AND STATUTES

UNITED STATES CONSTITUTION:

First Amendment 5, 6

Thirteenth Amendment 5

Fourteenth Amendment 3, 5, 6

Fifteenth Amendment 3, 5

CONSTITUTION OF THE STATE OF NEW YORK:

Article I § 1 3

Article VI § 1(a) 2

PAGE

Article VI § 13(a) 8
Article VI § 15(a) 2, 3, 8
Article VI § 15(b) 2
Article VI § 35(c) 2
N. Y. Civil Ct. Act § 102 7
N. Y. Civil Ct. Act § 301 7
N. Y. Civil Ct. Rule 1 7
N. Y. Election Law § 131(7) 11
N. Y. Election Law § 191 12
N. Y. Election Law § 314(5) 12
N. Y. Election Law § 314(11, 18) 12
N. Y. Laws 1962, ch. 694 § 4 2
N. Y. Laws 1965, ch. 1070 12
N. Y. Laws 1968, ch. 152 § 4 ..... 2, 3
N. Y. Laws 1968, ch. 987 .....2, 3, 6

IN THE

Supreme Court of the United States

OCTOBER TERM, 1968

Docket No. 1004

MARGARET COX, HOWARD R. MOODY, ALEX J. ROSENBERG, HUMBERTO APONTE, PAUL KERRIGAN, ANDREW COOPER, STANLEY HARRY HAMILTON, PETER WEISS and BEATRICE JONES, individually and on behalf of all other citizen-electors of the City of New York,

Petitioners,

against

HERMAN KATZ, City Clerk of the City of New York and JAMES M. POWER, THOMAS MALLEE, MAURICE J. O'ROURKE and J. J. DUBERSTEIN, Commissioner of Election, constituting the Board of Elections in the City of New York and ATTORNEY GENERAL OF THE STATE OF NEW YORK,

Respondents.

BRIEF OF RESPONDENT ATTORNEY GENERAL IN OPPOSITION TO CERTIORARI

Statement

Petitioners seek certiorari to the Court of Appeals of the State of New York. That Court unanimously affirmed an order of the the Appellate Division of the Supreme Court, First Judicial Department, which in turn unanimously affirmed an order of Supreme Court, New York County, denying petitioners' motion for a temporary injunction and dismissing their complaint.

The action sought to restrain the holding of the 1968 general election of Civil Court judges of the City of New York at which 25 newly-created positions were filled, as well as several vacancies. The election was held November 5, 1968 and the new judges took office January 1, 1969.

Reported below: 30 A. D. 2d 432; 22 N. Y. 2d 903.

Prior Proceedings

In 1961 the Civil Court of the City of New York was established, replacing the former City and Municipal Courts (N. Y. Constitution Art. VI § 1[a]). Judges of the Civil Court are to be chosen "by the electors of the counties included within the City of New York from districts within such counties established by law" (Art. VI § 15[a]). Existing judges of the City and Municipal Courts were made judges of the Civil Court for the remainder of their terms "and for such district as the legislature may determine" (Art. VI § 35[c]).

The Legislature, in pursuance of this mandate, provided that vacancies resulting from expiration of terms at the end of 1962 be filled "'by the electors of the county or district from which the judge whose term expires * * * was elected or appointed'" (L. 1962, ch. 694, § 4). This method of filling vacancies has been reenacted each year to date (L. 1968, ch. 152, § 4).

By Laws 1968, ch. 987, the New York State Legislature created 25 additional judgeships for the Civil Court of the City of New York, a court with civil jurisdiction in cases involving less than $10,000 (New York Const. Art. VI § 15[b]), to be elected at the 1968 general election by the voters of the respective counties to which such positions were assigned—7 each from New York and Kings Counties, 6 from Queens, 4 from Bronx and 1 from Richmond (L. 1968, ch. 987, § 14).

Petitioners brought this action to restrain the election of such 25 judges, alleging:

(1) Counties are not "districts" within the meaning of the provision of the State Constitution that judges of the Civil Court be chosen "by the electors of the counties included within the City of New York from districts within such counties established by law" (Art. VI § 15[a]);

(2) The failure of the additional judges act (L. 1968, ch. 987) to provide for a primary election for the nomination of Civil Court judges violated the State Constitution (Art. I § 1);

(3) The allocation of such judges to counties and their election county-wide violated the "one-man-one-vote" doctrine and discriminated against Negro and Puerto Rican voters; and that

(4) The provisions for filling vacancies on the Civil Court caused by the expiration of term of former Municipal Court justices by the electors of the Municipal Court district from which the incumbent had been elected (L. 1968, ch. 152) violated the "one-man-one-vote" doctrine and discriminated against Negro and Puerto Rican voters.

The first two of these causes involved pure issues of State law and petitioners conceded as much in their complaint, which made not the slightest reference to the United States Constitution in either of those causes of action (Complaint ¶1-37; pp. 39-40). The other two causes referred to the Fourteenth and Fifteenth Amendments only, as well as the State Constitution (Complaint ¶46, 54, 69; p. 40).

The Supreme Court, New York County, denied the temporary injunction sought by petitioners and dismissed the complaint (1a). Affirming, the Appellate Division of the Supreme Court, First Department, upheld the "statutory allocation of judges [as] presumptively constitutional"

(4a) and held these provisions "do not infringe the right of franchise or the equal protection provisions" because (5a-6a):

> "There are many relevant factors in the allocation of judges, including population, volume and nature of litigation, location of governmental agencies and officials and transportation facilities.
>
> * * *
>
> There is no constitutional requirement for allocation of judges on the sole basis of population. (*N. Y. State Association of Trial Lawyers* v. *Rockefeller,* 267 F. Supp. 148; *Kail* v. *Rockefeller,* 275 F. Supp. 937.)"

The Court added that "[t]he asserted inability of certain minority groups to nominate or elect a judge of their own persuasion does not afford a constitutional basis for relief" (6a), citing the language of Mr. Justice DOUGLAS' dissent in *Wright* v. *Rockefeller,* 376 U. S. 52, 66 (1964):

> "The principle of equality is at war with the notion that District A must be represented by a Negro, as it is with the notion that District B must be represented by a Caucasian, District C by a Jew, District D by a Catholic, and so on * * *. That system, by whatever name it is called, is a divisive force in a community, emphasizing differences between candidates and voters that are irrelevant in the constitutional sense."

Petitioners' other contentions were similarly rejected. The Court of Appeals, unanimously affirming, concurred in the Appellate Division opinion and added "a few lines to point up the federal questions urged upon us by the plaintiffs" (10a-11a):

> "There is no basis for the application of the 'one-man-one-vote' principle to the present case. That doctrine, designed to assure representative govern-

> ment in a democracy such as ours, was never intended to regulate the election of judges whose functions are solely judicial. There is neither reason nor justification for a requirement that judges be distributed or allocated throughout a state or city on a per capita basis. * * * The function of judges, it is manifest, is to apply the law, not to represent or champion the cause of a particular constituency."

Thereafter, on petitioners' motion, the Court of Appeals amended its remittitur to state that petitioners "contended that they were denied equal protection under the law contrary to the Fourteenth Amendment of the Constitution of the United States, and, further, that the Negro and Puerto Rican voters were, by said action, discriminated against by reason of their race, color and national origin and thus their right to effective franchise was diluted or destroyed contrary to the Fourteenth and Fifteenth Amendments" (16a). This was the precise language proffered by petitioners in their motion to amend the remittitur. Significant is the utter absence of any reference to the First or Thirteenth Amendments, relied on now for the first time by petitioners.

The election was held November 5, 1968 and the judges elected took office January 1, 1969 and are presently serving.

ARGUMENT

No substantial constitutional question worthy of consideration by this Court is raised by petitioners. The attempt to extend the *Reynolds* v. *Sims* holding to void last year's election of judges of the Civil Court of the City of New York is utterly without merit.

A.

The present petition seeks in large part to transmute into claims under the United States Constitution matters

of state law which were litigated as such in the state courts. The fourth "question presented" by petitioners (Pet. p. 3) deals with the fact that the statutes do not provide for a primary, as to which no federal claim was ever asserted below. It is far too late in the day for them to contend for the first time here that the failure to include a primary for the nomination of Civil Court judges impaired their right of association and right to vote contrary to the First and Fourteenth Amendments (Pet. p. 3). *Ellis* v. *Dixon,* 349 U. S. 458 (1955), reh. den. 350 U. S. 855; *Head* v. *New Mexico Board of Examiners,* 374 U. S. 424, 433 n. 12 (1963).

Likewise, reference to the First and Thirteenth Amendments by petitioners in their attempt to enlarge the "one-man-one-vote" principle and have it mandate precise uniformity of districts used for the election of judges is no more than an afterthought, barred by their conceded failure to invoke those provisions below (see Pet. p. 18).

Moreover, as we shall show, none of these claims, whether relied on below or voiced here for the first time, raises any such substantial issue under the Constitution as would justify review by this Court, especially where the relief sought amounts to the overturning of the election of more than 25 presently sitting judges—the new seats as well as several vacancies which were filled at the 1968 elections.

B.

Analysis of petitioners' claims shows that none assert the deprivation of any federally-protected right of petitioners. Their claim of "discrimination" against Negro and Puerto Rican voters does not withstand analysis. The 25 additional judges were elected county-wide as provided by the statute (L. 1968, ch. 987), which dovetails with the division of the Civil Court into counties for purposes of

venue and location of courthouses (See Civil Court Act §§ 102, 301; Civil Ct. Rule 1).*

The Legislature's determination to have 7 of the 25 new judges elected each from New York and Kings counties, 6 from Queens, 4 from Bronx and one from Richmond was an administrative distribution, not subject to challenge here.** These judges' "function is to administer the law, not to espouse the cause of a particular constituency." *Stokes* v. *Fortson,* 234 F. Supp. 575, 577 (N. D. Ga. 1964), which rejected a similar claim.

The fact is that every attempt since the legislative apportionment cases (*Baker* v. *Carr,* 369 U. S. 186 [1962];

---

* Civil Ct. Act § 102 in part provides:

"The court in each county of the city shall have an official seal * * *."

Section 301 provides for venue by county. And Civil Ct. Rule 1 in part states:

"(a) Divisions of the court shall be designated as follows:

The Civil Court of the City of New York, County of Bronx
The Civil Court of the City of New York, County of Kings
The Civil Court of the City of New York, County of New York
The Civil Court of the City of New York, County of Queens
The Civil Court of the City of New York, County of Richmond."

** This distribution represents an appropriate balance between the populations of the five counties and amount of litigation in the Civil Court in each, as shown:

	Number of Additional Judges	*Intake of Actions for year July 1, 1966-June 30, 1967*	*Population (1966)*
New York Co.	7	55,166	1,494,000
Kings Co.	7	35,379	2,561,000
Queens Co.	6	22,901	1,952,000
Bronx Co.	4	20,136	1,301,000
Richmond Co.	1	1,499	250,000

Source: Report of the Judicial Conference of the State of N. Y. (1968), pp. A136-A137.

Reynolds v. *Sims,* 377 U. S. 533 [1964]) to stretch their holding to cover the selection of judges has been rejected by the federal courts. See *N. Y. State Assn. of Trial Lawyers* v. *Rockefeller,* 267 F. Supp. 148 (S.D.N.Y. 1967); *Kail* v. *Rockefeller,* 275 F. Supp. 937 (E.D.N.Y. 1967); *Stokes* v. *Fortson, supra; Buchanan* v. *Rhodes,* 249 F. Supp. 860 (N. D. Ohio 1966), app. dism. 385 U. S. 3. The shoe simply does not fit. As District Judge TENNEY held in the *Trial Lawyers'* case (267 F. Supp. at 152):

> "In asking this Court to undertake the responsibility for ordering a judicial reapportionment of New York State judges, plaintiffs attempt to rely upon the recent legislative reapportionment cases (par. 25). Such reliance is totally without merit as should be obvious from a reading of the apportionment opinions.
>
> The reapportionment cases (*Reynolds* v. *Sims,* 377 U. S. 533, 84 S. Ct. 1362, 12 L. Ed. 2d 506 and companion cases decided on June 15, 1964) were concerned with the composition of state legislatures as 'the fountainhead of representative government in this country' and the recognition that 'Since legislatures are responsible for enacting laws by which all citizens are to be governed, they should be bodies which are collectively responsive to the popular will.' * * *
>
> The state judiciary, unlike the legislature, is not the organ responsible for achieving representative government. Nor can the direction that state legislative districts be substantially equal in population be converted into a requirement that a state distribute its judges on a per capita basis."

Indeed, there is of course no constitutional requirement that Civil Court judges be elected at all. Judges of the Criminal Court and Family Court of the City of New York, for example, are appointed by the Mayor (see N. Y. Const. Art. VI §§ 13[a], 15[a]). And legislation providing for mayoral appointment of Civil Court judges as well is

presently being given serious consideration. See N. Y. Times, Feb. 24, 1969, page 72.

The allegations of "invidious discrimination" against Negroes and Puerto Ricans are, in the context of this case, insupportable. Obviously no ethnic group has a vested interest in any public office. There is, and could be, no claim here that any New York City voter has been prevented from casting his ballot for any Civil Court judge because of his race or national origin. Petitioners' assertion amounts to the absolutely insupportable claim that unless Negroes and Puerto Ricans constitute a majority in a district from which a judge is to be elected, they cannot hope to elect one of their number to the bench.

This argument is an affront to the judiciary and the electorate as well. "The principle of equality is at war with the notion that District A must be represented by a Negro, as it is with the notion that District B must be represented by a Caucasian, District C by a Jew, District D by a Catholic, and so on." *Wright* v. *Rockefeller,* 376 U. S. 52, 66 (1964) (DOUGLAS, J. dissenting). See, to the same effect, *Mann* v. *Davis,* 245 F. Supp. 241, 245 (E. D. Va. 1965), aff'd *sub. nom. Burnette* v. *Davis,* 382 U. S. 42:

> "The concept of 'one person, one vote' we understand, neither connotes nor envisages representation according to color. Certainly it does not demand an alignment of districts to assure success at the polls of any race. No line may be drawn to prefer by race or color."

See too *Sincock* v. *Gately,* 262 F. Supp. 739 (D. C. Del. 1967); *Kilgarlin* v. *Martin,* 252 F. Supp. 404 (S. D. Tex. 1966), rev'd on other gds. *sub. nom. Kilgarlin* v. *Hill,* 386 U. S. 999; *Jones* v. *Falcey,* 48 N. J. 25, 222 A. 2d 101 (1966) (dismissing a claim that if the City of "Newark were constituted a single district, the political power of Negro voters in that district would be decisive and hence the al-

location of the city's wards within two districts dilutes their maximum political impact," and finding "no proof that the Legislature intended to advantage or disadvantage any racial or ethnic group" [p. 106]).

The cases relied on by petitioners dealt with far different facts and are of no assistance to them here. *Bell* v. *Southwell* (Pet. p. 20) ordered a new election in a county in Georgia where there was devastating proof of segregated voting and actual intimidation of Negro voters, aptly described as "gross, spectacular, completely indefensible * * * racial discrimination" (376 F. 2d 659, 664). The Court was compelled on these facts to employ the "[d]rastic, if not staggering" remedy (*id.* 662) of directing a new election. To cite such a case is to show its lack of applicability to the facts at bar.

Hamer v. *Campbell* (Pet. p. 26) is a strange case for petitioners to cite. There, as in *Bell,* the issue was outright denial of the vote to Negroes; and the Court of Appeals, in enjoining the election, was careful to distinguish reapportionment cases (358 F. 2d 215, 221):

> "[T]he reapportionment cases deal with dilution of the vote. The case involves a deprivation."

Petitioners insist (Pet. p. 16) they "do not request that the required elective districts be drawn on racial lines * * *." But this in effect is what they seek, in their reliance on population statistics in a prolonged attempt to show dilution of Negro and Puerto Rican votes. Since they criticize both use of the former Municipal Court districts (now employed only to fill vacancies in former Municipal Court judgeships) and of county-wide voting, what they seek is, in effect, the creation of new districts of such size and shape as to guarantee a number of Negro and Puerto Rican judges of the Civil Court in exact proportion to their percentage of the population. This amounts to a total distortion of the "one-man-one-vote"

concept and an unwarranted extention of that doctrine to the judiciary.

The claimed "dilution" of Negro and Puerto Rican voting rights (Pet. p. 21) is non-existent. Every voter is treated identically. The Legislature determined that counties were an appropriate district for the election of the 25 new judges here involved and that decision contained no such patent infirmity as to overturn the strong presumption of its constitutionality. The election of judges to replace former Municipal Court justices by the voters of the former Municipal Court districts was likewise a valid legislative determination and petitioners' repeated invocation of words such as "racial discrimination" and alleged "debasement" of voters' rights cannot create a serious constitutional issue where none exists.

Reliance for the first time here on *Jones* v. *Alfred H. Mayer & Co.* (Pet. p. 22) is far-fetched. That case simply had nothing to do with distribution of judicial positions, and to speak of "badges and customs of slavery" here is to spice a stew which contains no meat.

C.

Finally, the attempt to breathe a federal question into the claimed deprivation of a primary election (Pet. pp. 17-18, 25-26) is fatuous. That was framed by petitioners themselves as a pure issue of state law. Nowhere in their complaint or papers in the state courts did they rely on any federal provision, nor would any apply.

Moreover, this contention was properly rejected by the state courts as insubstantial. The New York Election Law provides that where, as here, a vacancy in elective office occurs less than five weeks before any scheduled primary election, candidates are nominated by the county committees of the various parties. Election Law § 131(7). The primary date was June 18, 1968, and the statute by its terms took effect June 1st. Thus, the provisions of § 131(7)

came into play. The law does not limit candidates to those nominated by the parties, but specifically provides for independent nominations. Election Law § 314(11, 18).

The state courts properly found no constitutional or other infirmity in this statutory scheme, part of New York law for decades. Petitioners' claim of some inherent right to a primary under the Constitution is without substance. They point to no specific provision or case requiring a primary in every situation, nor is there any. See *Exon* v. *Tiemann*, 279 F. Supp. 609, 613 (D. C. Neb. 1968) ("it is not necessary to the validity of an election that a candidate for Representative be nominated in a Primary."). What the Constitution does require is that every enrolled voter be permitted to participate equally in whatever methods are established by law for the nomination of candidates. *Smith* v. *Allwright*, 321 U. S. 649, 664 (1944). There is absolutely no showing that that right was abridged here.

Although petitioners toss off the remark that New York law permits a primary "in the spring or fall or on both occasions" (Pet. p. 18, fn.), they cite no authority for this statement and there is none. Election Law § 314(5), applicable in 1968, expressly states:

> "The primary election shall be held on the eighteenth day of June before the general election."

See also Election Law § 191(1)(a) (as amended by L. 1965, ch. 1070), which repealed the earlier provisions for a fall primary, and fixed the date of the primary on the third Tuesday of each June.

Petitioners' reference to the State Constitution as requiring a primary (Pet. p. 17) is inaccurate and in any event of no assistance to them here. The state courts' holding (6a) that the state constitutional provisions were not violated is binding here. *American Fed. of Labor* v. *Watson*, 327 U. S. 582 (1946); *Norman M. Morris Corp.* v. *Hess Bros.*, 243 F. 2d 274 (3rd Cir. 1957).

Finally, *Williams* v. *Rhodes* (Pet. p. 25) is not helpful to petitioners. There was no discrimination here as between different political parties. The right to file independent nominations was explicitly provided for. The relief here sought—aptly characterized in *Bell* v. *Southwell* as "[d]rastic, if not staggering"—is utterly unwarranted by any claim in the petition. Nor do petitioners' frequent, and totally unsubstantiated, stage-whispers of "deals" by "party leaders" add anything of merit to their claims.

CONCLUSION

The petition for certiorari should be denied.

Dated: New York, New York, February 24, 1969.

Respectfully submitted,

Louis J. Lefkowitz
Attorney General of the
State of New York
Respondent pro se

Samuel A. Hirshowitz
First Assistant Attorney General

Philip Weinberg
Principal Attorney

George D. Zuckerman
Assistant Attorney General
of Counsel